

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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DONNA MOORE, FRENCHOLA HOLDEN, and KEITH MCMILLON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

GMAC MORTGAGE, LLC, GMAC BANK and CAP RE OF VERMONT, INC.,

Defendants.

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Civil Action No. 2:07-cv-04296-PD

**DECLARATION OF KAY FITZ-PATRICK**

I, KAY FITZ-PATRICK, declare as follows:

1. I am a member of the State Bar of California. My *pro hac vice* application for limited admission to practice before this Court is pending. I am an attorney in the law firm of Morrison & Foerster LLP, counsel of record for Cap Re of Vermont LLC (“Cap Re”) and GMAC Mortgage, LLC (“GMAC Mortgage”) in the above-entitled case. I have personal knowledge of the matters set forth in this Declaration. Regarding matters stated on information and belief, I believe them to be true. If called upon as a witness to testify about the contents of this Declaration, I could and would competently do so.

2. The Settlement Agreement<sup>1</sup> provides that one of two methods would be used for ultimately allocating payments from the common fund to the Participating Class Members. More specifically, the parties agreed that the allocation method would be either *pro rata* or by

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<sup>1</sup> This Declaration incorporates by reference the definitions in the Settlement Agreement and all capitalized terms shall have the same meaning as the Settlement Agreement unless otherwise defined herein.

reference to the number of private mortgage insurance payments paid by the class member. Settlement Agreement at § 4.3. Both methods have been approved by courts in connection with settlements of similar actions.

3. Under Section 4.3 of the Settlement Agreement, Cap Re and GMAC Mortgage were to conduct a “good-faith investigation” into “whether the number of primary mortgage insurance payments made by class members for all Reinsured Loans<sup>2</sup> from the period beginning on January 1, 2004 and ending on December 31, 2008, the date when Cap Re ceased reinsuring loans (“Payment Information”) is reasonably obtainable from the readily-searchable computer media of Cap Re and GMAC Mortgage.” *Id.* at § 4.3. If that investigation revealed that Payment Information was not reasonably obtainable, counsel for Cap Re and GMAC Mortgage was required to submit a declaration attesting to the investigation and its conclusion, in which event the *pro rata* allocation is to be used. *Id.* at § 4.3(a). As explained below, Cap Re and GMAC Mortgage conducted a diligent, good-faith investigation that revealed that Payment Information is not reasonably-available from their readily-searchable computer media.

### **INVESTIGATION**

4. Pursuant to § 4.3(a) of the Settlement Agreement, this declaration describes the information available to, and efforts taken by, Cap Re and GMAC Mortgage to investigate whether Payment Information is reasonably obtainable from the readily-searchable computer media of Cap Re and GMAC Mortgage.

5. Over the course of three months, Cap Re, GMAC Mortgage, and their counsel (“Defense Counsel”) investigated whether Payment Information was reasonably obtainable from their readily-searchable computer media.

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<sup>2</sup> The Settlement Agreement defines “Reinsured Loan” as “a residential mortgage loan (a) that was originated and/or acquired after January 1, 2004, by GMAC Mortgage, Ally Bank, or their affiliates and (b) that was reinsured by Cap Re.” Settlement Agreement at § 1.4.

6. Defense Counsel conducted approximately fifteen calls with current and former employees of Cap Re and GMAC Mortgage from the relevant departments (*e.g.*, business, eDiscovery, and data systems) and third parties that we anticipated might have relevant information related to Payment Information. There were between four and eight participants on each of these calls. In addition to these calls, Defense Counsel exchanged dozens of e-mails with current and former employees of Cap Re and GMAC Mortgage on the same issue.

7. At the direction of Defense Counsel, employees of Cap Re and GMAC Mortgage conducted numerous follow-up investigations between the calls, internally and with former employees and third parties, concerning the availability of Payment Information.

8. Cap Re and GMAC Mortgage researched which computer systems and archives might contain data concerning Payment Information and whether such data could be extracted. Cap Re, GMAC Mortgage, and Defense Counsel also reviewed data extracts to determine what types of data were not available at all, what types of data were available, and what types of data were incomplete.

9. We estimate that more than one hundred and fifty hours were invested in the investigation by Cap Re, GMAC Mortgage, and Defense Counsel. I personally spent at least 30 hours reviewing materials related to Cap Re's reinsurance loans.

### **CONCLUSIONS**

10. As explained more fully below, the investigation revealed that the number of primary mortgage insurance payments made by each class member for all Reinsured Loans from the period beginning on January 1, 2004, and ending on December 31, 2008, is not reasonably obtainable from the readily-searchable computer media of Cap Re and GMAC Mortgage because we were unable to find (a) any source that tracked the number of primary mortgage insurance payments made by borrowers or any source that had complete data for the entire class and (b)

where some aggregate amount of payments existed, determining the number of primary mortgage insurance payments for each class member would require at a minimum a loan-by-loan manual review of Reinsured Loans.

11. On June 28, 2008, plaintiffs deposed Elliott Grumer as a representative of Cap Re pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, (“Grumer Depo.”). True and correct copies of excerpts are attached as Exhibit A.

12. Cap Re does not and has never had any employees. Grumer Depo. 83:12–19. Cap Re has agreements with third parties for the provision of administrative, accounting, legal and actuarial services. *See id.* at 84:2–11 and 86:6–14; *see also* Cap Re Statutory Basis Financial Statements December 31, 2007 and 2006 [filed under seal as Ex. C to EWC Decl. to Mot. for Class Cert.,] at 023756.

13. Cap Re has been in run-off since December 31, 2008, which means that it has not reinsured any new loans since that date. *See* Milliman Statement of Actuarial Opinion dated July 1, 2010, [filed as Ex. 17 to EWC Decl. to Mot. Summ. J.,] at 33113.

14. Cap Re does not maintain, and has never maintained, its own database of individual loan servicing data for the class members’ loans. Grumer Depo. 112:20–22.

15. Cap Re received quarterly summaries called “cession statements” from each private mortgage insurance (“MI”) provider with whom it had captive reinsurance arrangements. Grumer Depo. 49:21–50:2. The cession statements are typically provided as Excel spreadsheets or Adobe PDFs with each MI provider using its own format. *See, e.g.*, PMI Ceding Statement for the period ending September 30, 2010 [filed as Ex. 18 to EWC Decl. to Mot. Summ. J.,]. Further, the cession statements primarily provided consolidated data for the loans in the captive during that quarter. *Id.* The MI providers did not include the number of MI payments paid by

borrowers, or any information from which such a number could be derived, in the cession statements. *Id.*

16. As noted above, Cap Re does not maintain its own database of loan level data. Instead, Cap Re had access to loan-level servicing data maintained by GMAC Mortgage, its parent company, which also previously serviced class members' loans. Grumer Depo. 112:13–19. Our investigation did not reveal that GMAC Mortgage did tracked of the number of MI payments made by borrowers, and GMAC Mortgage did not have a data field designated for Payment Information in its servicing system.

17. For loans that it acquired, rather than originated, we were only able to confirm that GMAC Mortgage had MI payment data starting from the date of acquisition. Even, then the MI payment data was encoded in Loan Histories similar to the ones described in Paragraph 23. Similarly, GMAC Mortgage only had MI payment data through the date of sale for those loans that it owned and subsequently sold. Thus, GMAC Mortgage did not have complete or accurate payment data for the entire class.

18. On May 14, 2012, GMAC Mortgage and certain of its affiliates filed voluntary petitions under Chapter 11 of Title 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"). The petitions are being jointly administered and are styled *In Residential Capital, LLC*, No. 12-12020-MG ("*ResCap*"). Cap Re was not a debtor.

19. On November 21, 2012, the Bankruptcy Court approved the sale of mortgage servicing and origination platform assets to Ocwen Loan Servicing, LLC ("*Ocwen*") and Walter Investment Management Corporation ("*Walter*"). *See ResCap*, ECF Nos. 2246, 2769. Attached as Exhibit B is a true and correct copy of the January 31, 2013, press release announcing the

completion of the Walter portion of the sale. Attached as Exhibit C is a true and correct copy of the February 28, 2013, press release announcing the completion of the Ocwen portion of the sale.

20. As a part of the sale of loan servicing from GMAC Mortgage and its affiliates, servicing data for the majority of the active loans was transferred to Ocwen's servicing platform. *See* Exhibit C. The servicing data for Fannie Mae Agreements was transferred to Green Tree Servicing LLC ("Green Tree"), a subsidiary of Walter. *See* Exhibit B.

21. As noted above, GMAC Mortgage did not have a data field for Payment Information in its servicing system. Consequently, neither Ocwen nor Green Tree would have received Payment Information from GMAC Mortgage upon the transfer of servicing data. Cap Re and GMAC Mortgage attempted to engage the assistance of Ocwen and Green Tree to locate Payment Information. Based upon inquiries to Ocwen, we determined that Ocwen does not track, and has never tracked, Payment Information for borrowers. On information and belief, Green Tree similarly does not track, and has never tracked, Payment Information for borrowers.

22. As noted above, GMAC Mortgage did not have complete servicing data for the class. Consequently, Ocwen and Green Tree would also lack complete or accurate data for the class. Additionally, based upon inquiries to Ocwen, we determined that servicing data for any loans in the settlement class that were not actively serviced (*e.g.*, sold or paid off) prior to the transfers is not readily available from Ocwen's servicing system. On information and belief, Green Tree would have the same data gap. Moreover, Ocwen is in the process of changing its servicing platform. It is our understanding that the new platform will contain even fewer data fields than Ocwen's current servicing platform.

23. Based upon inquiries to Ocwen, we determined that the servicers cannot export general payment data on a class-wide basis. Ocwen can export general payment data on a per loan basis, called a Loan Payment History. Exporting the Loan Payment Histories is

complicated and time-consuming. It is our understanding that Ocwen would need to export the Loan Payment Histories in batches and only in the evenings in order to avoid logjams with its other work. Conservatively estimated, it would take Ocwen 40 hours of project time to complete an export.

24. After the export, someone would have to manually review and compile the Loan Payment Histories. Each payment in the Loan Payment History is assigned a code indicating the type of payment. For each class member, an individual would need to decode the Loan Payment History manually in order to determine which payments can be attributed to primary mortgage insurance, then tally the number of payments. Loan Payment Histories vary in length depending on the servicing length of the loan and the different types of payments made on the loan. They can be as short as a single page to as long as 20 pages. One or more employees for post-bankruptcy GMAC Mortgage would need to complete the manual review. As GMAC Mortgage is the process of winding down, it does not have the manpower to dedicate to a manual review. Not only would it be difficult and time-consuming to review the file-level data for each class member in order to count the number of MI payments, the Settlement Agreement provides that such a review is not necessary. Settlement Agreement at § 1.7. Moreover, a file-level review would be futile given the incomplete and inaccurate servicing data.

25. Cap Re attempted to engage the assistance of Milliman, Inc. (“Milliman”) a third party who provides actuarial services for Cap Re to locate Payment Information. In that capacity, Milliman receives quarterly data tapes from each of the MI providers that include loan-level data for loans reinsured by Cap Re. As the custodian of this data, we believed that Milliman would be the most likely party, if any, to have accurate information. Based on inquiries to Milliman, however, we determined the data in Milliman’s possession is subject to several limitations.

- a. The MI providers did include the number of MI payments made by borrowers on the data tapes.
- b. Milliman did not separately track the number of MI payments made by borrowers.
- c. Milliman began receiving the quarterly data tapes of loan-level data for loans reinsured by Cap Re from the MI providers in the first quarter of 2009 and Milliman had no data tapes for the January 1, 2004, to December 31, 2008, period.
- d. Although Milliman has some loan-level data for loans that were still in the captive from 2009 on, it only has aggregate payment data for those loans. The aggregate payment data consists of a number representing the total amount of MI premiums received by the MI provider through the quarter for the data tape. This aggregate payment data did not, however, distinguish between premiums paid by borrowers and premiums paid the servicer, (*e.g.*, for times when a loan was in arrears).
- e. Even if Milliman were to attempt to reverse-engineer the number of MI payments from the aggregated data, the results would not be accurate or complete because (1) Milliman did not have any information to assess whether the premiums were actually paid by the borrower or the servicer and (2) the MI providers did not always provide the recurring MI premium payment amount—whether monthly, annually, or other—and to the extent that the MI providers did provide a recurring MI premium payment amount, it was not updated to reflect changes in the amount over time.
- f. Milliman does not have data for a large number of the loans believed to be in the settlement class. This is primarily because many settlement class loans had been paid off or sold and others were subject to rescission prior to the time that Milliman began receiving the data tapes.



26. While there may be some payment data in the possession of the nonparty MI providers with which Cap Re had reinsurance agreements, we have determined that such data is not reasonably obtainable. On information and belief, the MI providers face constraints that would prevent them from providing the payment data—to the extent that they still maintain the data—needed to determine the number of MI payments made by borrowers in the entire class. Due to the financial crisis, all of the MI providers had to trim staff and limit expenses, on information and belief. Three of the seven MI providers have been in run-off since 2008: PMI Mortgage Insurance Company, Triad Guaranty Insurance Company, and Republic Mortgage Insurance Company. PMI Mortgage Insurance Company and Triad Guaranty Insurance Company file for bankruptcy protection.

27. Based on the foregoing, we concluded that the number of primary mortgage insurance payments made by each class member for all Reinsured Loans from the period beginning on January 1, 2004, and ending on December 31, 2008, is not reasonably obtainable from the readily-searchable computer media of Cap Re and GMAC Mortgage.

I declare, under penalty of perjury under the laws of the United States, that the foregoing is true and correct.

Executed this January 30, 2014, in Philadelphia, Pennsylvania.

*/s/ Kay Fitz-Patrick*

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KAY FITZ-PATRICK